Supreme Court, U.S.
FILED

03 226 JUN 9 - 2003

No. _____

UNITED STATES SUPREME COURT
Term: October, 2002

JOHN R. WHALEN **PETITIONER**

v.

COMMONWEALTH OF KENTUCKY **RESPONDENT**

On Petition for Writ of Certiorari to the United States Supreme Court

---

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

ED W. TRANTER
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HIPP

QUESTIONS PRESENTED FOR REVIEW

1. Whether the particularity requirement has been met when a warrant was issued using broad and general terms to describe what police were looking for when they had enough information to describe with particularity the items they wished to seize but failed to do so.

2. Whether all evidence seized by police should be suppressed due to the fact they seized hundreds of items that did not even fit the description of "video tapes" and "video recording equipment."

3. Whether the Trial Court's severance ruling that certain items seized might be inadmissible cures the violations of the United States Constitution.

LIST OF ALL PARTIES TO THE PROCEEDINGS

Petitioner/Appellant/Defendant – John R. Whalen

Respondent/Appellee/Plaintiff - Commonwealth of Kentucky

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW.....i

LIST OF ALL PARTIES TO THE PROCEEDING.....ii

TABLE OF CONTENTS.....iii-iv

INDEX TO APPENDICES.....v

TABLE OF AUTHORITIES CITED.....vi-vii

OPINIONS BELOW.....2

JURISDICTION.....2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE.....3-7

REASONS FOR GRANTING THE WRIT:

1. The search warrant did not meet the particularity requirement of the United States Constitution.....7-8

2. The police seized hundreds of items that did not even fit the general description of "video tapes" and "video recording equipment," requiring suppression of all of the evidence seized 9-10

3. The Trial Court's severance ruling that certain items seized might be inadmissible does not cure the violations of the United States Constitution.....10

CONCLUSION.....11

INDEX TO APPENDICES

APPENDIX A	Kentucky Supreme Court Decision
APPENDIX B	Kentucky Court of Appeals Decision
APPENDIX C	Application and Affidavit for Search Warrant 10/20/00
APPENDIX D	Search Warrant 10/20/00
APPENDIX E	Inventory of Items Seized at Search of 10/20/00

TABLE OF AUTHORITIES CITED

CASES: PAGE:

UNITED STATES SUPREME COURT

United States v. Leon, 468 U.S. 897; 104 S.Ct. 3405; 82 L.Ed. 2d. 677.....8

Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979).....9, 10

Marron v. United States, 275 U.S. 192, 196 (1927).....8

Stanford v. State of Texas, 379 U.S. 476 (1965).....7

Steele v. United States, 267 U.S. 495 (1925).....8

Ybarra v. Illinois, 444 U.S. 85, 92, 100 S.Ct. 338, 342, 62 L.Ed.2d 238 (1979).....7

UNITED STATES COURT OF APPEALS

United States v. Cardwell, 680 F.2d 75 (9th Cir. 1982).....10

Florida v. Johnson, 605 So. 2d 545 (1992).....9, 10

STATUTES

28 U.S.C. § 1257 (a).....2

UNITED STATES CONSTITUTION

U.S Constitution Amendment IV.....2, 7

No. _____

UNITED STATES SUPREME COURT

Term: October, 2002

JOHN R. WHALEN **PETITIONER**

v.

COMMONWEALTH OF KENTUCKY **RESPONDENT**

On Petition For Writ of Certiorari to the United States Supreme Court

---

PETITION FOR WRIT OF CERTIORARI

Comes now the Petitioner, John R. Whalen, by counsel, and respectfully requests that a Writ of Certiorari issue to review the denial of certiorari by the Supreme Court of Kentucky (2002 SC-0339-D) filed on 3/12/03 and the Opinion of the Commonwealth of Kentucky Court of Appeals (2001-CA-000684-MR) filed on 3/22/02. In its Opinion, the Kentucky Court of Appeals determined that the seizure of some of the items from the Petitioner's home may have exceeded the scope of the warrant but it did not amount to a flagrant disregard of the warrant therefore not converting the search to a general one. As a result, the Kentucky Court of Appeals (2001-CA-000684-MR) affirmed the Judgment of the trial court (00-CR-674), Kenton Circuit Court, of 3/28/01.

This is a motion for certiorari asking the Court to review a search and seizure of the Petitioner's home based on the particularity requirement of the 4th Amendment.

OPINIONS BELOW

In February 2001 the Kenton Circuit Court entered Judgment (00-CR-674) after accepting the Petitioner's conditional guilty plea and he was convicted for the Use of a Minor (under 16 years old) in a Sexual Performance. At sentencing, the Petitioner was sentenced to twelve (12) years in the State Penitentiary. On appeal, the Commonwealth of Kentucky Court of Appeals (2001-CA-000684-MR) affirmed the judgment of the Circuit Court on the Petitioner's motion to suppress the fruits of the search of his home pursuant to a search warrant. The Supreme Court of Kentucky denied certiorari (2002-SC-0339-D).

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Cons. Amend IV: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On October 20, 2000 Detective Ron Johnson of the Ft. Mitchell Police Department signed an Application and Affidavit in support of a search warrant to search the home of Movant, John R. Whalen, at 60 Superior Drive, Ft. Mitchell, Kentucky, requesting that he be able to search those premises for "**video tapes and video recording equipment**." (APPENDIX D)

In Detective Johnson's Affidavit (APPENDIX C) was contained a hearsay statement that movant's son, Christopher Whalen, had advised Detective Johnson that he viewed a videotape showing the Movant, John R. Whalen, and a male, white minor, nude on a couch masturbating each other. That videotape is the basis for the indictment for violation of K.R.S. 531.310, use of a minor in a sexual performance.

On presenting the Affidavit in support of the search warrant Judge Martin Sheehan on October 20, 2000, the Judge signed the search warrant that was actually drafted and prepared by the Commonwealth and brought to the Judge for signing. It commanded any policeman, sheriff, constable, or other police officer of the Commonwealth of Kentucky to search the premises at 60 Superior Drive, Ft. Mitchell, Kentucky, for the following property:

Video tapes and video recording equipment (APPENDIX D)

Although the Affidavit (APPENDIX C) in support of the search warrant did indicate that there was a specific videotape that caused the request for the search warrant, the warrant itself, as drafted by the prosecution, did not specify any particular video tapes. And the search warrant did not reference, nor incorporate the application and affidavit as further describing the videotapes to be seized.

With the warrant in hand, Det. Ron Johnson and Sgt. Tom Loos, accompanied by Officers Bussman and Taylor, went to the Whalen home on October 20, 2000 to search for

and seize video tapes and video recording equipment. The Movant, upon presentation of the warrant, suggested to Det. Johnson that he though he knew what he was looking for, that being tapes of various sex acts that were kept in Mr. Whalen's foot locker in the basement behind the bar, which required a key to unlock, and then a knife to actually open.

Upon opening the locked box with a key and then prying it open with a knife, Det. Johnson discovered a great many videotapes, along with audiotapes and magazines and other items that were not tapes. The inventory indicates that there were 159 items in that box that were seized, and the contents were listed and numbered as 1 through 159.

The warrant did not name the specific videotape that was mentioned in the Affidavit in support of the search warrant and that videotape was not among approximately fourteen (14) videotapes seized from the locked box (APPENDIX E). But the police testified that they were looking for that tape and any that **in their discretion** were explicitly adult videos, and did not take those that were not adult, videos, only those the police believed to be in the scope of the investigation according to their judgment.

While Det. Johnson was going through tapes downstairs to decide which were explicitly adult videos to be seized, Sgt. Loos was upstairs looking for that specific videotape which is the basis of the charge against John R. Whalen. Sgt. Loos testified that while upstairs he viewed videotapes that he found in parts of the home he searched, including commercial movie tapes and family videos and that he **used his discretion** to **decide which of the videotapes were applicable to his investigation** and took only those. Det. Johnson also testified that he **used his discretion** in determining **what videotapes at the Whalen home to seize**. And of course, the warrant merely recited any peace officer was commanded to search for "**video tapes and video recording equipment**."

After Sgt. Loos was unable to locate the video that he was looking for and described to Det. Johnson by Christopher Whalen, Sgt. Loos began questioning Mr. Whalen about the whereabouts of that specific videotape that was reported to have been in a camera in the Whalen home on October 19, 2000. According to the report of the officer, Mr. Whalen questioned what that camera was important, and Sgt. Loos explained that the camera and the video it contained were "specifically" named in the search warrant, which was not true. Sgt. Loos, in his testimony, continued to maintain that where the warrant commanded seizure of "video tapes and video recording equipment" that that constituted a specifically named camera and the video it contained. Sgt. Loos was so certain about the specific videotape that he was there to seize; that he explained to Mr. Whalen that he "believed the videotape contained a recording of him and a teenager masturbating each other." After Sgt. Loos advised of the specific video tape that he was looking for, Mr. Whalen then asked if the fact that the teenager consented would make a difference, to which Sgt. Loos replied that there were "several factors that had to be considered when deciding how significant the recording would be." In his testimony on January 29, 2001, Sgt. Loos was asked about the "several factors" that would have to be considered in deciding the significance of the recording and basically was only able to say that the age of the teenager was a factor. He further acknowledged that he was aware of the Affidavit filed on behalf of the Commonwealth by Det. Johnson stating that the person in the video was a minor and appeared approximately 14 years old; and of course, if the person had not been a minor, the officers would not have been there with the search warrant to begin with.

After discussion about the "several factors," and the Movant being told that the police would continue to search until every place that could contain the video camera would be searched, Mr. Whalen then showed the officers where the camera and videotape were located.

The police then left the Whalen home with all of the tapes, magazines and other items listed in the inventory. (APPENDIX E)

After the Movant was Indicted on or about December 15, 2000 and the Movant filed his motion to suppress the use of the search of October 20, 2000 on January 8, 2001. An evidentiary hearing was held on the motion to suppress on January 29, 2001, and the Court entered an Order on February 13, 2001 denying the motion to suppress as it related to other items seized (00-CR-674) stating in that opinion,

> IT IS HEREBY ORDERED AND ADJUDGED that the defendant's motion to suppress, as it relates to the videos and video camera, is DENIED.
>
> FURTHER, the defendant's motion to suppress, as it relates to all other items seized, is TAKE UNDER SUBMISSION. If the Commonwealth seeks to admit any of these items in evidence, it shall promptly notify counsel for the defendant, and this issue will be reconsidered by the court upon request of the defendant.

Thereafter, on February 19, 2001, the Movant filed a motion to be re-arraigned and tendered a conditional guilty plea on February 22, 2001. The Court entered a final judgment and sentence of imprisonment on March 28, 2001, sentencing the Movant to twelve (12) years in a state penitentiary (00-CR-674).

Consistent with the guilty plea, the Movant then filed a Notice of Appeal on March 29, 2001.

The Court of Appeals issued its Opinion on March 22, 2002 affirming the Trial Court's ruling on the search (2001-CA-000684-MR). As to the issue of the search warrant not

particularly describing the videotape that the police officers were searching for and seized, the Court of Appeals stated, "both officers were aware of the facts establishing probable cause and understood the object of their search accordingly.... [and] the officers had found the very tape and camera they wanted." The very tape that the officers wanted was not described with any particularity in the search warrant, and thus, it was left for the officers to exercise their discretion in deciding which tapes they wanted.

REASONS FOR GRANTING WRIT

I. The search warrant did not meet the particularity requirement of the United States Constitution.

The Fourth Amendment to the United States Constitution provides in part: **that no search warrant shall issue, but upon probable cause,... and particularly describing the place to be searched and the ... things to be seized.**

In the set of facts at issue here the warrant was as general as one could imagine. The warrant (APPENDIX D) merely provided for seizure of: videotapes and video recording equipment. The requirement of particularity is not a mere "technicality," it is an express constitutional command. *Ybarra v. Illinois*, 444 U.S. 85, 92, 100 S.Ct. 338, 342, 62 L.Ed.2d 238 (1979). It is because the requirement of particularity was not found in the warrant at issue here that the video should not be allowed in against the Appellant. The Court has found in the past that warrants that were more specific than the one at issue here were not specific enough to pass Constitutional muster. The Court has found that a warrant ordering officers to search for "books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning state Communist Party and its operations" fell into the category of

a general warrant and violated the constitutional requirement that warrants shall particularly describe the things that are to be seized. *Stanford v. State of Texas*, 379 U.S. 476 (1965).

The warrant at issue here ordering officers to search for "video tapes and video recording equipment" is less specific than the one from *Stanford*. In our set of facts there were no guidelines for law enforcement officers to follow and what resulted was a general search warrant to be executed solely at their discretion. There were no descriptions, although they had one, and nothing to guide the officer's search once they were inside the house. "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Marron v. United States*, 275 U.S. 192, 196 (1927). Here, the officers admitted to seizing items at their discretion thus explicitly violating the Appellant's constitutional rights and calling for the items unlawfully seized to be suppressed.

A search warrant according to the United States of America and the State of Kentucky requires, in order to comply with their respective Constitutions, a description with as much particularity as reasonable under the circumstances the things to be seized. *Steele v. United States*, 267 U.S. 495 (1925), *United States v. Leon*, 468 U.S. 897; 104 S.Ct. 3405; 82 L.Ed. 2d 677.

In our case, the warrant, which was drafted by the police for the Judge's signature could have been drafted to describe the videotape that was alleged to show the commission of the crime of sexual performance with a minor. The Appellant's son, Christopher Whalen, had provided the specific information that could have described the videotape. The police had this report when filling out the warrant but failed to use it to specifically describe the video. With the extremely vague command to seize "video tapes" the police decided to seize all videotapes which they, at their discretion,

believed to be in the scope of their investigation. However, the warrant did not describe the video that Christopher Whalen told of, and it did not incorporate the Affidavit to reference what specifically should be seized.

II. The police seized hundreds of items that did not even fit the general description of "video tapes" and "video recording equipment," requiring suppression of all of the evidence seized.

The warrant although unconstitutionally vague, did restrict the seizure to videotapes and video recording equipment, but even that was ignored during the search. The police, under this warrant went into the Appellant's home and perused through the home seizing **at their discretion** things that were not even remotely close to "video tapes" or "video recording equipment."

Where a warrant authorizes police to seize specific pornographic video tapes and the officers exceed that authority by seizing all videotapes they feel obscene, the Court found that the Fourth Amendment was violated and thus suppressed all of the videotapes that were a result of law enforcement officials general exploratory rummaging in a person's belongings. *Florida v. Johnson*, 605 So. 2d 545 (1992). The Court went on to state that where law enforcement grossly exceeds the scope of the search warrant in seizing property, the particularity requirement is undermined and a valid warrant is transformed into a general warrant, thereby requiring suppression of all evidence seized under the warrant, citing, *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979). The Fourth Amendment requirement "that things to be seized be particularly described is to prevent a general, exploratory rummaging in a person's belongings. This is accomplished by removing from the officer executing the warrant all discretion as to what is to be seized. The

particularity requirement is even more stringent with things to be seized have the presumptive protection of the First Amendment."

In our case, the search even more grossly exceeded the lawful scope. After failing to describe with particularity what was to be seized, the search was not even conducted within the general scope of videotapes and video recording equipment. Instead, hundreds of magazines and other items were seized based on the policemen's judgment as to what he could find in the Appellant's home that he believed to be sexually explicit adult videos.

III. The Trial Court's severance ruling that certain items seized might be inadmissible does not cure the violations of the United States and Kentucky Constitutions.

The Trial Court, in ruling on Appellant's motion to suppress the fruits of the search of October 20, 2000, ruled that the "videos and video cameras" were admissible but that the Court would take under submission the motion relative to the other items, and rule only after the Commonwealth advised whether it would seek to admit those items into evidence, and the Defendant would then be required to again request a ruling.

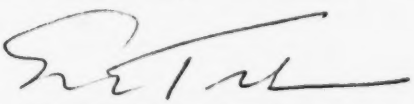
Severance is not a remedy in this case. First of all, the warrant was not nearly particular enough in its description of what tape or tapes should be seized, and therefore, none of the tapes or tape equipment could be used as evidence. (See list of cases cited in Arguments I and II). In addition, as indicated in *Florida v. Johnson*, and *Lo-Ji Sales, Inc. v. New York*, above, where a warrant is transformed by law enforcement officers into a general warrant to seize all that the officers determine in their discretion, to violate the law, all of the evidence seized under the warrant must be suppressed. This proposition has also been advanced in *United States v. Cardwell*, 680 F.2d 75 (9th Cir. 1982), where

it said that identifiable portions of a warrant must be sufficiently specific and particular to support a severance. None of the items seized were seized in conformity with the particularity requirement.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should be issued to review the Opinion of the Commonwealth of Kentucky Court of Appeals rendered on March 22, 2002 (2001-CA-000684-MR).

Respectfully submitted,



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Counsel for Petitioner,
John R. Whalen

APPENDIX "A"

SUPREME COURT OF KENTUCKY

2002-SC-0339-D
(2001-CA-0684-MR)

JOHN R. WHALEN MOVANT

KENTON CIRCUIT COURT
v. 2000-CR-0674

COMMONWEALTH OF KENTUCKY RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED: MARCH 12, 2003.

S/_____
CHIEF JUSTICE

APPENDIX "B"

RENDERED: MARCH 12, 2002; 2:00 p.m.
NOT TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY

COURT OF APPEALS

No. 2001-CA-000684-MR

JOHN R. WHALEN APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DOUGLAS M. STEPHENS, JUDGE
ACTION NO. 00-CR-00674

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: DYCHE, JOHNSON, AND KNOPF, JUDGES.

KNOPF, JUDGE: In October, 2000, four officers of the Fort Mitchell Police Department in Kenton County executed a search warrant at the residence of John Whalen. They seized numerous items including an 8mm video tape allegedly depicting Whalen and a fourteen-year-old boy engaged in sexual activity. Soon thereafter the grand jury indicted Whalen for the offense of using a minor in a sexual performance.[1] Whalen moved to suppress all the evidence taken from his residence--including the 8mm video tape and Commonwealth intended to introduce--but that motion failed,

[1] KRS 531.310, in this case a class B felony.

and he thereupon plead guilty, reserving the right to appeal the suppression issue. By judgment entered March 28, 2001, the Kenton Circuit Court sentenced him to twelve years in prison. This appeal then followed. Whalen contends that the search warrant for his residence failed to specify the objects of the search with the particularity required by both the federal and Kentucky constitutions and that the executing officers extended their search beyond even the excessive terms of the warrant. We are convinced, however, that the warrant was valid and its execution essentially lawful. To the extent, if any, that items were seized beyond the scope of the warrant, the proper remedy in this case, as the trial court ruled, was not to suppress all of the seized items, but only those in excess of the warrant. Accordingly, we affirm.

The warrant at issue was signed and executed on October 20, 2000. It authorized a search of Whalen's Fort Mitchell residence for '[v]ideo tapes and video recording equipment." It was based on the affidavit of the investigating detective, who averred that Whalen's son had come to the police station only hours before and reported that he had discovered in his father's residence a small, hand-held video camera containing a recording dated October 17, 2000, that depicted his father engaging in sexual activity with a boy Whalen's son thought to be about fourteen years old.

Between four and four-thirty that afternoon, four officers took the warrant to Whalen's residence to execute it. Two of the officers, the detective who had prepared the application and his immediate supervisor, carried out the search, while the two others watched Whalen and his wife. The two searching officers testified at the suppression hearing, and while it is not clear from their testimony or otherwise clear from the record whether the affidavit was attached to the warrant, it is clear that both were familiar with the affidavit prior to the search. Both testified that they were in search of tapes and equipment that might be those Whalen's son had reported, and not, for example, ordinary commercial videos.

As soon as the detective had read the warrant to him, Whalen led the detective to a footlocker in his basement where he kept various sex-related items. In the locker the detective saw, among other things, video tapes with labels and magazines with covers suggesting child pornography. The locker also contained a few *Playboy* magazines and other adult sexual materials. It was soon clear that the locker did not contain a video camera, so rather than make a detailed inspection of the footlocker's contents, the officers resumed their primary search. In response to Whalen's inquiry, one of the officers told him that they intended to look everyplace the camera might be. Thereupon Whalen produced the camera, which still contained the tape his son had viewed. After the officers had watched a portion of the tape, they seized it, the camera, and the footlocker with its contents, some 150 items. Whalen contends that the warrant did not adequately specify the video tape or type of video tape for which the officers could lawfully search. And he complains that the seizure of the footlocker with its many non-video-tape items "flagrantly" exceeded the warrant's scope. Although we disagree with both contentions, we need not address them in detail, because even if the warrant and search be deemed to come degree flawed, the flaws are not such as would call for the blanket suppression Whalen seeks.

Whalen is correct, of course, that both the federal Fourth Amendment and Section 10 of the Kentucky Constitution prohibit general warrants, warrants which, in effect, allow the government to rummage at large through one's belongings on the chance that something incriminating will turn up.[2] The constitutional provisions are intended to make such warrants impossible by requiring that no warrant shall issue except upon probable cause and that all warrants shall "particularly describ[e] the place to be searched, and the persons or things

[2] Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 60 L. Ed. 2d 920, 99 S. Ct. 2319 (1979); United States v. Ford, 184 F.3d 566 (6th Cir. 1999).

to be seized."[3] The relationship between the particularity requirement and the probable-cause requirement is worth noting. A finding of probable cause, of course, requires that there be particular facts suggesting a reasonable probability of a particular crime. A search warrant issued on the basis of such probable cause need only limit the object of the search to things genuinely related to those facts and probative of that crime.[4]

Whalen is also correct in noting that when the relationship between warrant and probable cause beaks down, suppression of the evidence is often the remedy. When the breakdown is severe, when the warrant on its face purports to authorize a search far in excess of that justified by probable cause, or when the executing officers flagrantly disregard the warrant's limitations, in effect converting the warrant to a general one, then a blanket suppression of the evidence may called for.[5] The general rule, however, is that "the remedy for an overbroad warrant [or an overbroad search] is to sever the overbroad portions of the warrant from those portions that are sufficiently particular.[6]

This is exactly the remedy the trial court provided. It found, and we agree, that the warrant validly authorized the officers to search for the tape and the camera Whalen's son reported. It is arguable, perhaps, that the warrant could have further specified the sort of tape or tapes they were to seek,

[3] U.S. Const. amend. IV. Marron v. United States, 275 U.S. 192, 72 L.Ed. 231, 48 S.Ct. 74 (1927). Kentucky's Constitution requires that the person or thing to be seized be described "as nearly as may be." (Ky. Const. § 10). and is to be construed as consonant with the Fourth Amendment. Crayton v. Commonwealth, Ky., 846 S.W.2d 684 (1992).

[4] United States v. Logan, 250 F.3d 350 (6th Cir. 2001).

[5] Lo-Ji Sales, Inc. v. New York, *supra*; United States v. Foster, 100 F.3d 846 (10th Cir. 1996); United States v. Decker, 956 F.2d 773 (8th Cir. 1992); Florida v. Johnson, 605 So.2d 545 (Fla. App. 1992); United States v. Cardwell, 680 F.2d 75 (9th Cir. 1982).

[6] United States v. Ford, 184 F.3d at 578. *See also* Commonwealth v. Smith, Ky. App., 898 S.W.2d 496 (1995); United States v. Greene, 250 F.3d 471 (6th Cir. 2001); United States v. Riggs, 690 F.2d 298 (1st Cir. 1982).

but it is clear, as the court also found, that both officers were aware of the facts establishing probable cause and understood the object of their search accordingly. It is also arguable, perhaps, that the seizure of the footlocker and its entire contents, particularly after the officers had found the very tape and camera they wanted, exceeded somewhat the basis for the search. Even if it did, however, it certainly did not amount to a flagrant disregard of the warrant or have the effect of converting the search to a general one. The footlocker contents after all were all in one place and could plausibly have been thought probative of the particular crime under investigation. And the search ended as soon as the officers found what they were authorized to look for. The trial court, moreover, recognized the possibility that some of the footlocker items had been inappropriately seized and assured Whalen that it would exclude any of that evidence ultimately determined to have been seized in excess of the warrant and not admissible under an exception to the warrant requirement. This is all the relief to which Whalen was entitled. We affirm, accordingly, the March 28, 2001, judgment of the Kenton Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Ed W. Tranter
Ft. Thomas, Kentucky

BRIEFS FOR APPELLEE:

Albert B. Chandler, III
Attorney General

Kent T. Young
Assistant Attorney General
Frankfort, Kentucky

APPENDIX "C"

Entered
Kenton Circuit/District Court
October 23. 2000
Mary Ann Woltenberg, Clerk
By: _____, DC

COMMONWEALTH OF KENTUCKY
COUNTY OF KENTON

APPLICATION AND AFFIDAVIT IN SUPPORT OF SEARCH WARRANT

Comes the Affiant, after first being duly sworn and cautioned and states that the information contained herein was received and made in his capacity as a Peace Officer. Affiant's name is Detective Ron Johnson, Ft. Mitchell Police Department, and Affiant believes there is on or in the premises numbered: 60 Superior Drive, Ft. Mitchell, Kentucky

more particularly described as Two story, single family brown brick and brown wood siding, cream color trim residence. The word "sixty" is in black lettering over the front entry way. There is an attached brick garage. The residence is located on the north side of Superior at the intersection of Dartmouth and Superior.

the following property:
Video tapes and video recording equipment.
N/A

which property affiant believes to be:
( ) stolen

(X) things used as the means of committing a crime

(X) things in possession of a person who has intention to use means of committing a crime or in the possession of another to whom any person may have delivered it for purpose of concealing it or preventing its being discovered.

(X) things which consist of evidence which tends to show that a crime has been committed or that a particular person has committed a crime.

(X) contraband

Affiant states that on October 20, 2000, Christopher Whalen told the Affiant that while in the residence of his father John Whalen, located at 60 Superior Drive in Ft. Mitchell, Kenton County, Kentucky, he viewed a video tape that showed John Whalen and a minor sitting together on a couch in the above described residence. Christopher Whalen further told Detective R. Johnson that both John Whalen and the male white minor were nude sitting on the couch and masturbating each other. The minor appeared to be approximately 14 years old and the date on the video was October 17, 2000.

Based upon all of the above, the Affiant requests that the warrant be issued to search the described residence, located at 60 Superior Drive, in Ft. Mitchell, Kenton County, Kentucky, in order to further the Affiant's continuing investigation.

S/_____
Detective Ron Johnson, Affiant

Subscribed and sworn to before me this 20 day of Oct, 2000, at 3:05 p.m.

S/_____
Judge, Kenton Dist. Court

Entered
Kenton Circuit/District Court
October 23. 2000
Mary Ann Woltenberg, Clerk
By _____ DC

APPENDIX "D"

Entered
Kenton Circuit/District Court
October 23. 2000
Mary Ann Woltenberg, Clerk
By: _____, DC

SEARCH WARRANT

THE COMMONWEALTH OF KENTUCKY

TO ANY POLICEMAN, SHERIFF, CONSTABLE, OR OTHER PEACE OFFICER OF THE COMMONWEALTH OF KENTUCKY:

Application, by affidavit, for a Search Warrant having been made this date, and it appearing that probable cause has been stated by the affiant, Detective Ron Johnson, of the Ft. Mitchell Police Department. **You are therefore commanded to search on or in the premises:**
60 Superior Drive, Ft. Mitchell, Kentucky

more particularly described as Two story, single family brown brick and brown wood siding, cream color trim residence. The word "sixty" is in black lettering over the front entry way. There is an attached brick garage. The residence is located on the north side of Superior at the intersection of Dartmouth and Superior.

for the following property:
Video tapes and video recording equipment.
N/A

and to safely hold any thereof you may find until further Order of a Court of Competent Jurisdiction, said property constituting evidence of an offense against the peace and dignity of the COMMONWEALTH OF KENTUCKY.

Witness my hand this 20 day of Oct., 2000.

S/_____
Judge, Kenton Dist Court
Division 4th .

Executed this warrant this 20th day of Oct.,
2000, at 4:17 p m. by

S/ Det. R. Johnson .

Entered
Kenton Circuit/District Court
October 23. 2000
Mary Ann Woltenberg, Clerk
By: _____, DC

ITEMS SEIZED

	ITEM	LOCATION
1.	Sony Digital Handycam with video inside	end table in living room - 1st floor
2.	Blackfoot locker containing several videotapes & assorted sexual device & sexually oriented material	Behind Bar in Basement
3.	2 VHS video tapes marked with DGT's initials	Located on top of bookcase behind bar in basement
4.	Key to footlocker	Voluntarily provided by John Whalen.
5.	_____	_____
6.	_____	_____
7.	_____	_____
8.	_____	_____
9.	_____	_____
10.	_____	_____
11.	_____	_____
12.	_____	_____

APPENDIX "E"

13-00-007336

Evidence #E00-166

#1 Sony Handycam containing a video of suspect and young male white in the act of masturbation

Inventory of #2 and #3

1. Spice exposed tape
2. Private moments tape
3. You are not alone tape
4. Generic box with note "Girls of the "B" movies
5. Generic box with note "Swedish erotica/Big bad and beautiful
6. Generic box with note "you are not alone"
7. Book - "What you always wanted to know about the teenage sexual undergroung"
8. The bigger the better tape
9. Generic tape marked XXXX Strange behavior
10. Booklet - Pornography in color
11. Polavision phototape cassette in box
12. Generic audio cassette
13. Generic audio cassette
14. Generic audio cassette marked 02/28/00 "phone sex with Brittney"
15. Generic audio cassette marked 02/17/00 "Carrie"
16. 8mm movie reel marked #5 Clits and dicks head
17. Generic audio tape marked Adam and the ants prince charming
18. 8mm movie reel
19. Generic video marked 8mm to video 1…mechanic etc…
20. Book - Joys of masturbation
21. Book - How to win over impotence frigidity
22. Booklet - The Kent Clinic Potency Program
23. Booklet - Penthouse Variations

24. Book - How to regain your virginity
25. Envelope addressed to "John R. Whalen with several copies of Arcade magazine and other sexually oriented material
26. Teen magazine
27. Jock scene magazine
28. Hot and Hung magazine
29. Lusty Boy magazine
30. Wonder Boys magazine
31. Ball Boys magazine
32. Horny Teen magazine
33. Fresh Cock magazine
34. New Cummers magazine
35. Teen cocks magazine
36. Sweet Meat magazine
37. Envelope w/several copies of Arcade magazine
38. 8mm reel marked #3 The Devil In Her
39. 8mm reel
40. 8mm reel marked Claudine and Annie
41. 8mm reel marked Hippy 2-2A
42. 8mm reel
43. Video - Cumming of age
44. Video insider Video clip previews Vol2
45. Joys of masturbating video
46. Swedish erotica video
47. Video - "Graduation"
48. Video - "All American Boys"
49. Video - "Interviews"
50. "Euro Flash" - Box only
51. Generic video with tag marked 28 min tape SP
52. Electric vibrator
53. Tube Joy jelly flavored lubricant
54. Bottle of baby oil
55. Leather case w/cocaine spoon/straw/razor blade/glass
56. Generic cassette tape

57. Generic cassette tape marked 4-11-00 JosZins (psychologist) 513-281-1138
58. Generic cassette tape marked party thur 3/9/00
59. Generic cassette tape marked Nick mamaw 10pm 2-20-00…
60. Generic cassette tape …several misc. labels
61. Generic cassette tape marked 2-12-00 Sara Bo coats (erin)

Kroger paper bag containing the following magazines:

62. Boys for Sale
63. Like Young Male Nudist Review
64. Manner Klimaks
65. Young Athletes
66. Young Champ
67. Young Chaps
68. Bachelor Boys
69. The Boys Next Door
70. Wild in the Woods
71. Team Boys No.1.
72. Young Naked Champs
73. Australian Golden Boys
74. Australian Golden Boys
75. Wild Boys
76. Male Tales
77. Mel Roberts Boys
78. Boyfriends
79. Mel Roberts Boys
80. Hot Studs
81. How to Photograph Boys
82. Teen Baskets
83. Gay Boy Magazine
84. Slick Cocks - End of Kroger bag contents
85. Generic video cassette marked "Stripped copy"
86. Video "After Dark"
87. Video "Doing It"
88. Video "A Summer Fantasy"

89. The Rob Lowe Tape - Video
90. Amateur Nude Strippers video
91. "Collection" Vo. 1 video
92. Amateur Nude Strippers 3 video
93. Generic video marked "Big Bad and Beautiful"
94. Generic video - no markings
95. Floridas Best Kept Secrets Golden Hills video remarked Vivid Video "Talk Dirty"
96. Amateur Nude Strippers 2 video
97. Generic video marked Club Head 1:161/2 S Original Tape
98. 8mm reel marked The actor - Heads
99. 8MM reel marked TE-7- Head tag inside marked "The Boy"
100 Teenage Nudist magazine
101 8mm reel marked TR-7- Head Tag inside "Kenney TR-7"
102 Boy marked Male J/O #2 copy on tape
103 Nudism today magazine
104 8mm reel box marked R8CXM09 100ft m J/O SBH
105 Campus Jaybird magazine
106 Nudism Today magazine
107 8mm reel box marked S8CXMFF
108 Little Nudist magazine
109 8mm reel mkd SE339 S.Mast.Head
110 Little Nudist Magazine
111 New Frontier Magazine
112 Sun Lore Magazine
113 Playboy March 1991
114 Nudist Youth Magazine
115 United States Postal Service Express Mail Envelope w/5 photos of erect penis
116 Teenage Sex magazine
117 American Sunbather Magazine
118 Playboy May 1999
119 Cheri Magazine

120 Playboy November 1997
121 Teenage Nudist magazine
122 Playboy March 1964
123 Teenagers magazine
124 Teenage Jaybird magazine
125 The Fuck Shop magazine
126 Teenagers magazine
127 Teenagers magazine
128 "missed number"
129 Trick N Treat magazine
130 Gayzette magazine
131 High School Fantasies magazine
132 Springtime Youth magazine
133 Boys from BMZ magazine
134 BOYS BOYS BOYS magazine
135 Dom's Boys magazine
136 Best of More magazine
137 OBC Boys No1 magazine
138 Teenage masturbation magazine
139 After school Sex magazine
140 Skating Board Heros magazine
141 Playboy March 1983
142 The Nude Stars magazine
143 Naked Teens in Action magazine
144 Collectors Choice Magazine
145 200 Boys Magazine
146 Young and Ready magazine
147 Playboy November 1963
148 Playboy December 1963
150 The Teenage Boy magazine
151 Where the Boys Are magazine
152 Playgirl July 1998
153 Encyclopedia of Love and Sex
154 6 Polaroid photos - 1 thru 6
155 Swedish Erotica 8mm reel
156 Swedish Erotica 8mm reel

157 Audio tape generic marked Sun 5- -00, Mike and Sara prom last night
158 Audio tape generic marked Billy Idol 'Rebel Yell"
159 3 condoms

#4 Key to footlocker - Item #2